No. 02-1321

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

THE CITY OF NEW YORK, *et al.*,

Petitioners,

v.

PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS WHO HOLD THE RANK OF POLICE OFFICER

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COUNTER STATEMENT OF THE CASE[1]

On August 9, 1997, Abner Louima, a black man of Haitian national origin, was arrested by officers of the New York City Police Department (hereinafter referred to as the "NYPD"). Shortly thereafter he was sexually assaulted by Police Officers in the 70th Precinct station house bathroom in Brooklyn, New York (hereinafter referred to as the "Louima incident"). Several weeks later, the record shows that Howard Safir, the Commissioner of the NYPD (hereinafter referred to as the "Commissioner") unilaterally transferred twenty-four (24) black police officers into the 70th Precinct. These transfers were based upon his belief that people respond best to people who look like them and upon his unsupported and unfounded fear of the potential for violent civil unrest (A471)[2]. Only after the lawsuit was filed did the Commissioner maintain that the illegal race based transfers were based upon an operational necessity. The Commissioner testified that a demand for these transfers was made at a meeting convened with him, the Mayor Rudolph Guiliani and the community leaders, two days after the Louima incident (A458). Specifically he testified that Councilwoman Una Clarke[3] (among others) told him that

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1. This brief is submitted on behalf of all the named plaintiffs-respondents who hold the rank of police officer and are hereinafter collectively referred to as "respondents".

2. Numbers in parentheses preceded by the letter "A" refer to the page numbers of the Joint Appendix filed in the Second Circuit. Numbers preceded by the letter "B" refer to the page numbers of the Appendix of the Petition for Writ of Certiorari.

3. Una Clarke, a New York City Councilwoman whose district includes the 70th Precinct.

the community demanded the transfer of black police officers into the 70th Precinct. However, in complete contradiction, Una Clarke testified that she never asked for, nor did she hear anyone else ask for the transfer of black police officers into the 70th Precinct (A820, A821, A825). Throughout the following weeks, even though there were uniformly peaceful protests, the Commissioner testified that he believed there was "a great potential for violence" (A459). Under the guise of operational necessity, these race based transfers occurred more than two weeks after the Louima incident, with the last transfer completed more than four weeks later.

All twenty-two police officers and two sergeants who were transferred, based solely on their race, brought suit against the Petitioners herein alleging violations of 42 U.S.C. § 1981; 42 U.S.C. § 1983; 42 U.S.C. § 1985; Title VII of the Civil Rights Act of 1964; the United States Constitution including the Equal Protection, Due Process, and Privileges and Immunities provisions of the Constitution and Amendments; Article I and II of the New York State Constitution; and § 296 of the New York State Executive Law.

The City of New York (hereinafter referred to as the "City"[4]) has conceded, as noted by the Second Circuit in its opinion, that the transfers of the minority officers were based solely on race (B7). Since race based transfers are inherently impermissible, the City argued the pretext of "operational needs".

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4. Unless otherwise noted,"City" refers to the petitioners in this lawsuit collectively.

In the district court, both the City and the plaintiffs moved, at pretrial, for summary judgment on various grounds. In the decision of *Patrolmen's Benevolent Association v. City of New York*, 74 F. Supp. 2d 321 (S.D.N.Y. 1999), the trial court found that the City's "operational needs" could constitute a compelling state interest to justify the illegal race based transfers, **but the jury would need to make a factual determination at trial that an "operational need" existed** (emphasis added). It was the City's burden to prove such a need at trial. The jury's unanimous verdict was that the City failed to meet this burden.

Over forty witnesses all uniformly testified at trial that prior to the illegal race based transfers, the neighborhood remained peaceful without riots or property destruction or arrests for violence or any other evidence of a "potentially violent" situation. Furthermore, officers specifically assigned to observe and report on the post Louima environment in the 70th Precinct found no civil unrest. Detective Yvan Pierrelouis, Caribbean Liaison for the NYPD, testified as to the general tenor of the protests. He testified to canvassing and surveying the temperament of the community and found no rioting, looting, property damages, or injuries in the aftermath of the Louima incident (A276). He specifically testified, on August 16, 1997, that he monitored a march and rally, which terminated in front of the 70th Precinct station house, and found the march to be "peaceful" (A278). Likewise, Police Officer Corlis Smith, Community Liaison for Brooklyn South and Staten Island, testified that there was "no civil unrest" (A257). The City showed the jury a videotape recording of the aforesaid march and rally, which clearly depicted the orderly and peaceful nature of the demonstration in the community.

A. Events Immediately Following the Louima Incident

As noted above, once the details of the Louima incident were made public, the intervening days were marked by a small number of peaceful demonstrations. On August 13, 1997, four days after the Louima incident, an orderly demonstration of "approximately 20 people" took place in front of the 70th Precinct (A206). It lasted one-half hour and its participants were vocal, yet peaceful, as testified to by Captain William Walsh, Commanding Officer of the 70th Precinct at the time (A206). Of critical importance is the fact that even Patrick Kelleher, First Deputy Commissioner of the NYPD, testified at trial that there was no violence (A492). James Hall, Executive Officer of the 70th Precinct, also testified that the protests were peaceful (A938).

As previously stated, the City's "operational needs" defense was allegedly based on community demand. The Commissioner testified that in two separate conversations with Councilwoman Clarke she stated, in no uncertain terms, that the NYPD "needed to do something very quickly and that if we didn't do something very quickly, there was going to be trouble." (A475). However, Ms. Clarke's statement was taken out of context as it referred specifically to removing all personnel from the station house *who were on duty* the night of the Louima incident (A820). There is no dispute that the white officers on duty that evening were immediately transferred out of the precinct in response to the community demand. The record is devoid of any request for the immediate transfer of black officers into the precinct.

On August 11, 1997, two days after the Louima incident, the Commissioner and Mayor met with leaders of the community in the 70th Precinct. Although the Commissioner testified at trial that various community leaders demanded the transfer of black officers, the City failed to offer the testimony of a single community leader to support the Commissioner's recollection of this "overwhelming theme". Indeed the only individual whose name the Commissioner recalled who attended the meeting was Councilwoman Una Clarke, who acted as a liaison between the community and the NYPD. However, she testified that she *never* requested that black police officers be transferred into the 70th Precinct. She testified clearly and unequivocally that "I did not ask for black police officers." (A820-A821). Further, Councilwoman Clarke testified that no community leader specifically asked for or demanded the transfer of black or Haitian police officers into the 70th Precinct. "No community leader told me that they wanted black officers." (A825).[5]

Contrary to Petitioners misstatement in their **QUESTIONS PRESENTED** that the 70th Precinct was "80% minority population", the City's statistical evidence presented at trial, established that the 70th Precinct was in fact a community comprised of 40.5% Blacks, and 21.3% of other minorities (A1300).[6] Incredulously, blacks and/or Haitians did not comprise a majority of the population within the

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5. In pretrial discovery the city had named approximately six such leaders on their witness list but failed to produce any at trial.

6. The misstatement used by Petitioners in their **QUESTIONS PRESENTED** is found in the testimony of the Commissioner who stated, in response to the inquiry concerning the racial make-up in the 70th Precinct, that he "believed" it to be 80%. (A912).

70th Precinct (NYPD Ethnographic Chart for Patrol Borough Brooklyn South, A1300). Captain Walsh testified that the Haitian community within the 70th Precinct was "relatively small" (A204). In addition, Councilwoman Clarke testified that the Haitian community did not comprise a majority of the 70th Precinct or even of the Carribean community within the 70th Precinct (A821).

Ironically and consistent with Una Clarke's testimony, the only documented demand made by the community was the request to return one of the white officers who had been transferred out. Raymond Diaz, Commanding Officer of the 70th Precinct at the time of the transfers, testified that he could not get approval to bring back the white female transferee despite community demand (A903).

The Commissioner testified at trial that there was what he believed to be a "great potential for violence" and that the NYPD "needed to act quickly and as quickly as possible to put people in the community who would have a stake in the community" (A468). Despite the Petitioners apparent belief that the situation in the 70th Precinct was volatile and exigent, the Commissioner did not utilize more immediate and less restrictive measures (A461). It is undisputed by the Commissioner's own testimony that this alleged emergency response took weeks to complete (A461).

In order to address what he believed to be an emergent situation, the Commissioner did not choose to "press a button" and effect immediate transfers within minutes, as he testified he was empowered to do (A461). Rather, the Commissioner directed his subordinates to utilize a lengthy bureaucratic time consuming personnel selection process

with the only selection requirement that the officer be black.[7] The process took weeks to complete even though the NYPD's Chief of the Personnel Bureau testified that "the most likely chance that you will have a demonstration is in close proximity to when the incident occurred" (A1091). Petitioners made no efforts to immediately address the alleged "operational needs" despite the fact that personnel changes could have been ordered within minutes by the Commissioner (A461). After a four week trial with over 40 witnesses and a videotape of an orderly demonstration, the jury found the "operational needs" defense was not supported by the weight of the evidence. The Respondents' own testimony and videotape belied the "operational needs" defense.

Moreover, despite the unprecedented situation in the community, the police officers transferred into the 70th Precinct were not specifically trained for the assignment and did not receive "any special or specific instructions" about their duties and the problems they might face (A538).

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7. Virtually all of the commanding officers that were directed to transfer officers to the 70th Precinct testified consistently that the only requirement that they were given was that the officers must be black (A317). This is confirmed by the testimony of Paul Schmucker, a Deputy Inspector and the Commanding Officer of the 69th Precinct at the time of the race based transfers. He testified as to the qualifications the NYPD required of the transferees; stating specifically, that black police officers were required without regard to time of service, civilian complaints, or disciplinary records (A318). Donald O'Donnell, the Commanding Officer of the 66th Precinct at the time of the race based transfers, was given specific instructions as to the selection. When asked "other than the fact that the officers were to be African-American or black, what other instructions were you given by the borough, if any," O'Donnell responded that he received "*no other instructions*." (A596).

In fact, Deputy Inspector O'Donnell, who was responsible for transferring eight of the Respondents, testified that his least experienced black police officers were transferred into the 70th Precinct (A596).

It is undisputed that there were less restrictive measures the City could have used to effectuate their perceived operational necessity other than the race based transfers. Specifically, as testified to by Respondents' expert Dr. Stephen Leinin, the department could have requested volunteers, and if no volunteers came forward, the Police Department could have tacked on any number of incentives for those who were willing to go into the 70th Precinct (A847). Further, they could have reached out for those Haitian-American officers that were working elsewhere in the city and they, perhaps, could have even offered them an incentive. In fact, Inspector Diaz testified that two police officers, one of which was Caribbean and another who was of Haitian descent, volunteered to be transferred into the 70th Precinct, but neither of their requests were honored (A906).

Finally, they could have hand-picked a variety of different officers from different racial and ethnic groups and made sure that the officers that they did hand-pick were trained in police/community relations (A847). The testimony presented, established the fact that there was a pattern and practice of race based transfers and reassignments. First Deputy Commissioner Kelleher initially stated at trial that race is a consideration when officers are initially assigned out of the police academy (A482, A491).

The jury having heard the aforesaid testimony by both Kelleher and Leinin, could reasonably conclude that

Petitioners proffered defense of an "operational need" for these race based transfers was wholly unsupported by the evidence.

B. Damages Suffered By Black Transferees

All witnesses both for Petitioners and Respondents testified that the 70th Precinct was a stressful, demoralizing, and humiliating place to work in the aftermath of the Louima incident. All of the command staff testified that morale was at an all time low (A237). All Respondents herein have testified that they felt betrayed by the NYPD for treating them differently solely because of the color of their skin. The Respondents' position was summed up by Officer Gary Johnson who testified:

> I felt *betrayed* because I was transferred because of my race and that, in fact, placed me at high risk. When I took this job, I took this job with everyone else in the police department for shared risk, that we should all take. By sending me solely because I'm black, placing me at a higher risk than anyone else and all my other colleagues (A245).

Further, Officer Marva Gardner testified that:

> I was totally upset because all these years, when I got hired to do this job, my race didn't factor into it. The only thing that factored into it was that my performance, the type of job that I was doing. It didn't matter that I was black or I wasn't black. And now, here it is ten years later and you're telling me that I can only preform my job in a black community, I can't do the job anywhere

> else? In my opinion, that's what they were saying to me, that I was only effective working with my own people and not anyone else (A303).

The testimony revealed that black police officers were subjected to greater prejudice because of their race. The treatment the transferred police officers received from the community as a whole and the perception of the black police officers by members of the community was worse than the treatment received by their white counterparts. Officer Robert Drayton testified that "they call you Uncle Tom. They will give you the finger. They just have no respect for you; you know; throw things out the window at you." (A325). Officer Dave Guevera, testified that when he was stationed outside the 70th Precinct, he had to endure insults from the community. "They called me names, such as 'Uncle Tom,' 'sell out.' They cursed at me. They put their fingers up at me. (A338). Furthermore, Officer Robert Winslow testified that "they would say things like 'You're going to shove that stick up my ass also' or 'plunger posse,' or they would refer to me as like a 'house nigger,' 'Uncle Tom.'" (A538). Only a few of the epithets directed at black police officers are excerpted above. All the Respondents were subject to derogatory remarks concerning their involvement in the Louima incident. In fact, Respondent Robin Irvin, testified that being black made the situation all the more difficult (A384).

The low morale caused by the race based transfers in the 70th Precinct was in stark contrast with the atmosphere of comradery at the precincts from which the Respondents were transferred. As all parties testified, "[t]he morale, it was very low. Very poor morale. No one knew who anyone was." (A237). Exemplifying this low morale, was the testimony of Officer Michael Butler to the effect that when roll call began

at the 70th Precinct, "you see white officers on the left-handed side and black officers and minorities on the right-side on roll call" (A939).

The Respondents' home and private lives were also impacted by the transfers. Officer Kenneth Zepherin testified that he had to drop his college classes after he was transferred (A349). Officer David Guevera testified that he had problems with his girlfriend and his family as a result of the stress of being transferred (A346).

The significant stress which the Respondents suffered as a result of being singled out, based on their race, caused stress to their families and disruption in their home lives. Officer Robert Winslow felt "horrible inside." (A539). Officer Plunkett Silas testified that he felt "humiliated" and "ashamed" so much so that he "didn't want to go to work." (A394). As a result, he suffered from headaches and had to see a headache specialist (A395). Demetria Singleton testified that when she found out about the race based transfers she felt "angry" and "disgusted." (A560). In addition, her transfer was a hardship because she had an autistic son who "cannot accept change" (A562) and she also experienced increased difficulty obtaining child care because her commute was more than doubled (A559). She called Employee Relations and told the Sergeant "the situation with [her] two children that are labeled as disabled, autistic, and told him my situation as a single mother. You know, I was working in the 62. I had school close by. I had everything already situated." (A560). As a result of the increased stress on her, Ms. Singleton also had to seek counseling from her pastor (A564).

Adding to the transferees' emotional stress was the fact that, unlike any other NYPD officers, their requests to transfer

were summarily denied. Lou Matarazzo, the then President of the New York City Patrolmen's Benevolent Association (Police Union), testified that he contacted the NYPD regarding the transfers and stated that the NYPD's response "was rather simple: no one was transferred back and they were going to stay there." (A313). The evidence substantiates Matarazzo's testimony that the NYPD maintained that position. The police officers who would not accept their assignment to the 70th Precinct and filed a request for transfer, did so, only to have their requests deleted from the system. (A334, A339).

In summary, as the trial court stated, "in order to prevail on this defense, defendants must demonstrate, at trial, that [1] community hostility towards the NYPD followed the Louima incident [2] such hostility compromised the goal of effective law enforcement and that [3] race-based transfers would restore that goal." *Patrolmen's Benevolent Association v. City of New York*, 74 F. Supp. 2d at 329-330. The jury unanimously rejected the defense and refused to find justification for the race based transfers. The fact that there was no evidence of hostility or civil unrest, as the Petitioners conceded at trial, gave the jury a basis to find that the goal of effective law enforcement was never compromised. Therefore, Petitioners' never established an "operational need" to justify or legalize the race based transfers.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW DOES NOT PRESENT A CONFLICT.

The decision of the Second Circuit clearly follows the standards set by this Court. In *Wygant v. Jackson Bd. of Educ.*[8], 476 US 267 (1986), this Court held that race based considerations must "necessarily be subject to a most searching examination" (476 U.S. at 273; *see also Fullilove v. Klutznick*, 448 US 448, 491 (1980)) and applied a two-prong test: (1) racial classifications must be based on a "compelling state interest" (476 U.S. at 274; *see also Palmore v. Sidoti*, 466 U.S. 429, 432 (1984); *Loving v. Virginia*, 388 U.S. at 11 (1967); *Graham v. Richardson*, 403 U.S. 365, 375 (1971); *United States v. Paradise*, 480 U.S. 149 (1987)) and (2) the "means chosen to effectuate its purpose must be 'narrowly tailored to the achievement of that goal'" (*Wygant* at 274 citing *Fullilove* at 480).

Petitioners argue in their first **QUESTIONS PRESENTED** as follows:

> Was the consideration of race by the New York City Police Commissioner Howard Safir in transferring a proportionally small number of police officers from adjoining precincts into the 70th Precinct to meet the compelling state interest of effective law enforcement constitutionally permissible where there was a highly publicized assault and sexual torture of Abner Louima, a

8. *See also Palmore v. Sidoti*, 466 U.S. 429 (1984); *Graham v. Richardson*, 403 U.S. 365 (1971); *Loving v. Virginia*, 388 U.S. 1 (1967).

> person of Haitian descent, by white police officers, in the 70th precinct, a precinct with an 80% minority population, and the Police Commissioner was advised at a meeting with community leaders, two days after the event, that there was a potential for civil unrest, and accordingly, the Commissioner made those race-based transfers to quell the possibility of civil unrest and violence and to demonstrate to the community the Department's intent to engage in effective, unbiased law enforcement ?

Specifically, they ask whether race based transfers of police personnel may be justified by the department's compelling interest (operational need) in effective law enforcement. Petitioners' question has already been answered by this Court and the constitutional limits of race based discrimination have been firmly established. Therefore, Petitioners' question is not appropriate for review. In addition, both the district court and the Second Circuit clearly agreed that it was entirely reasonable for the jury to conclude that the Petitioners had failed to establish a compelling state interest for the race based transfers.

Petitioners' phrasing of their first **QUESTIONS PRESENTED** reveals their objective: to seek error correction. Petitioners do not claim that there is a conflict between the Federal Circuits. Rather they prefer to urge upon this Court an appeal of a factual determination disguised as a vital question of Constitutional limitations. However, this Court has long held that it "do[es] not grant a certiorari to review evidence and discuss particular facts," *United States v. Johnston*, 268 U.S. 220, 227 (1925), for its "certiorari jurisdiction is designed to serve purposes broader than the

correction of error in particular cases." *Watt v. Alaska*, 451 U.S. 259, 275 (1981) (Stevens, J., concurring); *see also Ponte v. Real*, 471 U.S. 491, 501-02 (1985) (Stevens, J., concurring) ("The merits of an isolated case have only an oblique relevance to the question whether a grant of certiorari is consistent with the sound administration of this Court's discretionary docket."). The case herein is a singularly inappropriate vehicle for consideration of either of the **QUESTIONS PRESENTED** by the Petition. The Second Circuit correctly followed this Court's admonition that:

> "Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Fullilove v. Klutznick*, 448 U.S. 448, 537 (1980). In determining whether a race-based measure is narrowly tailored, courts consider factors such as the need for the measure, the efficacy of alternative measures, and the flexibility and duration of the measure. *See Paradise*, 480 U.S. at 171; *United States v. Secretary of HUD*, 239 F.3d at 219 (both discussing narrow tailoring in the context of the remedial affirmative action plans) (Opinion of the Second Circuit herein) (B17).

The trial record was correctly read by the Second Circuit when they found that there was a basic factual dispute between the Petitioners and Respondents as to whether or not there was a "compelling state interest" (operational need) sufficient to make race based employment decisions. In its decision, the court below noted that the jury heard testimony from over forty witnesses, including numerous top ranking police officials, that there was no rioting, looting, or other

violence in the 70th Precinct following the Louima incident. Additionally, the jury viewed a videotape submitted by the City depicting a pre-transfer march and orderly demonstration. From the overwhelming facts presented, the jury could have reasonably concluded, and in fact did conclude, that the City had not demonstrated that the transfers were an immediate response to an emergency situation narrowly tailored to meet a compelling state interest. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. at 314.

Therefore, for the aforementioned reasons, the Petitioners' Writ for Certiorari on the first **QUESTIONS PRESENTED** should be denied.

II. EMOTIONAL DISTRESS DAMAGES WERE PROPERLY AWARDED AND ARE ADEQUATELY SUPPORTED IN THE TRIAL RECORD.

A review of the trial transcript clearly indicates that the jury was presented with two types of evidence to support an award for emotional damages: (1) corroborative evidence and (2) evidence of physical manifestations of emotional distress. The jury was charged, by the trial judge, to include in the verdict sheet their decision of the amount of an award, if any, for emotional distress for each individual respondent. The jury was also asked to indicate on the verdict sheet, as to each respondent, if the individual police officer had proven that their emotional distress was either substantiated by a physical manifestation as indicated by a "P." and or corroborated by other evidence in the record as indicated by "C" (A1378-1379).

It is well recognized that courts may award emotional distress damages in § 1983 cases. *See, e.g., Miner v. City of*

Glens Falls, 999 F.2d 655, 662 (2d Cir. 1993). It is essential that the plaintiff establish that he or she suffered an actual injury caused by the deprivation of constitutional rights and show a direct nexus between the injury and the constitutional violation. *See Carey v. Piphus*, 435 U.S. 247, 263-64 (1978). The damage award must be supported by competent evidence. *See Cohen v. Bd. of Educ.*, 728 F.2d 160 (2d Cir. 1984); *Price v. The City of Charlotte*, 520 U.S. 1116 (1997). This court's decision in *Carey*, supra, was appropriately recognized and applied by the Second Circuit to the case below (B22-23). The Second Circuit also found that evidence of medical treatment was helpful but not required (B23).

The record below is replete with evidence of the damages suffered by all the black police officers transferred into the 70th Precinct. The jury specifically identified on the verdict sheet fifteen plaintiffs that had corroboration and nine that had physical manifestations (A1378-1379). Further, in response to the court's inquiry to the jury foreperson in taking the verdict, the panel responded that in every instance where they found a physical manifestation, there was also corroborative evidence (A1200).

The statement in the Petitioner's Writ of Certiorari that "no corroborating evidence of alleged symptoms was provided by any plaintiff or witness" is completely disingenuous (Pg. 23). The Petitioners, in making such a sweeping statement, have failed to cite any evidence in the record below in support of their argument.

Therefore, for the aforementioned reasons, the Petitioners' Writ for Certiorari on the second **QUESTIONS PRESENTED** should be denied.

The Petitioners ostensibly present a number of constitutional objections to the decision below; none of which are appropriate for this Court's review of the record herein. There exists no basis for review as these issues were correctly decided and affirmed by the courts below.

CONCLUSION

For the foregoing reasons, the Petitioner's Writ for Certiorari should be denied.

Respectfully submitted,

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